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No. 83690-6
Court of Appeals No. 272010

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ELCON CONSTRUCTION, INC.,

Petitioner,

vs.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

INLAND NORTHWEST AGC, ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, AND OREGON-COLUMBIA CHAPTER'S JOINT AMICUS CURIAE BRIEF

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On behalf of the Inland Northwest AGC, AGC of Washington, and Oregon-Columbia Chapter

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I. IDENTITY AND INTERESTS OF THE AMICI.

The amici parties jointly submitting this amicus brief are the Inland Northwest AGC, the Associated General Contractors of Washington, and the Oregon-Columbia Chapter, who are each local chapters of the Associated General Contractors of America, a nationwide, full-service, professional trade association.

The members of these local trade associations include general contractors, specialty contractors, and associates, including suppliers and other construction service providers. The members also include both union and non-union organizations. The Inland Northwest AGC has over 325 members in Eastern Washington and Northern Idaho. The Associated General Contractors of Washington has over 600 members in Western Washington. The Oregon-Columbia Chapter has nearly 1,100 members in Oregon and Southwest Washington.

The primary mission of the Associated General Contractors of America, and in turn, these local trade associations is to promote skill, integrity, and responsibility in order to achieve a better construction industry.

One critical service provided by these local trade associations to their members is the evaluation of policy implications regarding government actions and decisions that affect the livelihood of contractors.

These trade associations provide recommendations and guidance to their members based on the policy evaluations.

The amici's participation in this case is part of this policy review function, but the amici's interests run deeper than mere policy. The subject matter of this case deals specifically with the concepts of integrity and responsibility within the construction industry, and an adverse ruling here has the potential to significantly undermine those values within the construction industry in Washington State.

II. INTRODUCTION.

The primary issue of interest to the amici is the application of the independent duty doctrine (formally, the economic loss rule) to claims for fraudulent concealment and fraud in the inducement, and particularly in the public works setting. If the independent duty doctrine is held to apply to fraud in the inducement and fraudulent concealment claims made by contractors in the public works sector, such as those claims brought here by Elcon Construction, Inc. ("Elcon"), governmental entities like Eastern Washington University ("EWU") will have the wholesale opportunity to defraud contractors during the bidding process, and defrauded contractors will have no vehicle by which to protect themselves or recover for such fraud. Furthermore, the application is against public policy as it will promote and reward dishonesty in Washington business transactions and lead to increased costs on all public works contracts.

Although the Petition for Review in this case predates this Court's recent case law relating to the independent duty doctrine, it seeks a necessary clarification of the Court's previous rulings with respect to fraud-based claims. The clarification is very important to the construction industry as a whole, and as the facts of this case show, the public works sector. Regardless of this Court's determination relative to the facts specific to Elcon's claims, the amici urge that this Court clarify the law in Washington relative to the application of the independent duty doctrine to cases for fraud, and particularly, fraudulent concealment and fraud in the inducement.

III. STATEMENT OF THE CASE.

The amici keep their statement of the case intentionally brief, as it appears that EWU and Elcon, as the primary parties to this dispute, have sufficiently identified the majority of the material from the record relevant to this matter. The amici therefore include a brief overview of the facts as they relate to the argument herein, including clarification of the few facts the amici feels were not fully addressed in the briefs submitted to date.

The facts of the case generally show that EWU denied the existence of and withheld from bidders an extensive geohydrological investigation (referred to as "the Golder Report", *see* CP 316-358) during the bidding process for the refurbishment of two water supply wells on EWU's campus. CP 864-865; CP 1113; CP 1166. The Golder Report, which had been commissioned by EWU and which was prepared with the assistance of EWU employees (CP 624-636; CP 534-607; *see also* CP 608-623; CP 645,-696), showed that in order to supply adequate water, any new well would require a depth of 1500'. CP 316-356; CP 563-588; CP 640-641. EWU was also aware that drilling to a depth of 1500' required specialized equipment not commonly found in the Pacific Northwest. CP 713-714. EWU takes the position that the Golder Report and related study were irrelevant to the project at issue for reasons noted below.

EWU employees who were aware of the Golder Report designed the project at issue and drafted the bid proposal and scope of work (CP 695-96), which included two new wells, each drilled to a depth of 750'. CP 671. The bid proposal requested a per-foot drilling price for the new wells. CP 671. The bid proposal and eventual contract also included language that the contractor was required to continue to drill until it reached adequate water (CP 306), and the contract also severely limited the contractor's ability to bring extra cost claims beyond its per-foot price. CP 92-102.

It does not appear from the briefing submitted by the parties to the Court of Appeals that EWU has provided an adequate explanation for the project's deviation from the recommendations in the Golder Report (CP 703-4; CP 740), except to state that the wells to be drilled by Elcon were intended simply to "refurbish" EWU's existing wells, and as such, fell outside the scope of the Golder Report and related study, because they were not technically "new" wells. *See Brief of Respondent*, pp. 1-3.

Notably, EWU also admits and the record shows that under Department of Ecology ("DOE") regulations "refurbishment" of an existing well could include drilling a replacement well as long as the new extraction point was in the immediate proximity of the existing well. CP 303. Contrary to EWU's position in its Brief at pp. 1-3, the DOE allowed the drilling of "new" wells under the concept of "refurbishment" and "new" wells were specified in the project at issue.

Specification 1.03, Examination of Site and Conditions, sets forth the responsibilities Elcon undertook relative to subsurface conditions in preparation of its bid proposal:

> By submission of a proposal, the Bidder acknowledges:
>
> . . .
>
> 2. That it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered <u>insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by Owner</u>, as well as

> from the drawings and specifications made a part of these Contract Documents. [emphasis added]

CP 313.

Prior to bid, Elcon performed an onsite investigation and also requested that EWU share all information it had in its possession relating to wells in the area "including exploratory work by owner . . ." (CP 864-65; CP 1113), but Elcon was not supplied the Golder Report by EWU in response to this request. CP 864-65. When questioned further by Elcon, EWU specifically denied the existence of any relevant studies or reports. CP 673. Elcon was the eventual successful bidder on the project.

When the well depth became an issue during performance, and Elcon made a claim for added costs, EWU terminated Elcon's contract for convenience (CP 103), but not without first attempting to convert the termination to default. CP 113-14. There was a significant volume of activity below, including an arbitration of Elcon's contract-based claims, which were decided in favor of Elcon. CP 249-50.

It appears from the record that EWU does not deny the basic facts relating to the intentional concealment of the Golder Report, but instead has relied almost solely on the application of the independent duty doctrine to shield it from tort liability. The trial court granted EWU's renewed motion for summary judgment based on the economic loss rule

(CP 1379-1384), which was upheld by the Court of Appeals for Division 3. This Court's review stems from that decision.

IV. ARGUMENT.

A. THE INDEPENDENT DUTY DOCTRINE SHOULD NOT APPLY TO CLAIMS OF FRAUDULENT CONCEALMENT OR FRAUD IN THE INDUCEMENT.

1. Background - Independent Duty Doctrine.

As this Court is well aware, the independent duty doctrine was developed by courts to keep parties from circumventing contract law. "Economic loss is a conceptual device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable in contract." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986, 990 (1994), *citing Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 861 n. 10, 774 P.2d 1199, 779 P.2d 697 (1989). Damages that fall on the contract side of the line between tort and contract are considered "economic losses." *Id.* Losses that flow only from contract are prohibited under the economic loss rule because tort law is not intended to compensate for breach of contractual duties. *Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864, 868 (2007), *citing Factor Mkt. Inc. v. Schuller Int'l Inc.*, 987 F.Supp. 387, 395 (E.D. Pa. 1997); *see also*, *Duquesne Light*

Co. v. Westinghouse Elec. Co., 66 F.3d 604, 618 (3rd Cir. 1995) and *Palco Linings, Inc. v. Pavex Inc.*, 755 F.Supp. 1269, 1271 (M.D.Pa. 1990).

The logic that supports the application of the independent duty doctrine and its limitation of tort actions where the parties have a contract is the concept that contracting parties generally have the opportunity to allocate risk and liability during contract negotiations. For example, in Washington, the economic loss rule has generally been found to bar claims for negligent misrepresentation when a contract allocates liability for such claims. *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 211, 969 P.2d 486 (1998). The net effect of the application of economic loss rule in Washington's history has been to bar virtually all tort actions, with few exceptions, as between parties to a contract.

However, there has been ambiguity and uncertainty in Washington law regarding the correct application of the independent duty doctrine to tort actions based on fraud. Recently, the Court of Appeals for Division 1 refused to accept intentional misrepresentation (common fraud) as an exception to the economic loss rule, concluding that there was no precedent to support such exclusion. *See Carlile v. Harbor Homes Inc.*, 147 Wash.App. 193, 205, 194 P.3d 280, 286 (2008). In the *Carlile* case, subsequent purchasers of a newly-constructed home brought claims against the builder for breach of implied warranty of habitability, misrepresentation, breach of contract, and violation of the Consumer Protection Act relating to construction defects. *Id.* at 193-94. The Court of Appeals upheld the trial court's dismissal of the intentional misrepresentation claims based on the economic loss rule. *Id.* at 205.

The Court of Appeals for Division 2 agreed with *Carlile's* finding that intentional misrepresentation was barred by the economic loss rule, particularly if other contract remedies exist. *See Poulsbo Group LLC v. Talon Dev. LLC*, 155 Wash.App. 339, 347, 229 P.3d 906, 910 (2010). In that case, a purchaser of a subdivision plat brought an action against the vendor, alleging intentional misrepresentation, breach of contract, and breach of the implied duty of good faith and fair dealing. *Id.* at 340-41. The Court of Appeals upheld the trial court's dismissal of the intentional misrepresentation claims based on the economic loss rule. *Id.* at 347.

However, this Court has previously held that claims for fraudulent concealment are not precluded by the economic loss rule. *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864, 871 (2007); *citing Atherton Condominium Apt. Owners' Assoc. v. Blume Dev. Co.*, 115 Wn.2d 506, 523-27, 799 P.2d 250, 260-262 (1990). In the *Alejandre* case, buyers purchased a home with a defective sewer system and sued the vendor for fraudulent or negligent misrepresentation, fraudulent concealment, and common law fraud. *Id.* at 679-681. After dismissal of the buyers' claims by the trial court, the Court of Appeals reversed. On review, this Court reversed the Court of Appeals relative to the negligent misrepresentation claims, and also acknowledged that the fraudulent concealment claim was not barred by the economic loss rule. *Id.* at 676. However, this Court found that the buyers' claim nevertheless failed because they had failed to meet their burden of proof. *Id.*

This Court has also recently clarified some of the apparent confusion in the lower courts regarding application of the economic loss rule, holding that: "An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Eastwood v. Horse Harbor Found. Inc.*, 170 Wn.2d 380, 389, 241 P.3d 521, 1256, 1262 (2010). Accordingly, the economic loss rule has been effectively renamed the "independent duty rule" or independent duty doctrine. *Id.* at 394.

Although this Court stated in *Eastwood* that it did not intend to overrule any of its previous cases, it emphasized that the independent duty doctrine is a case-by-case question of law that "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Eastwood*, 170 Wn.2d at 389, *citing Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

Nevertheless, there appears to be no existing Washington case law that adequately explains why Washington courts have treated fraudulent concealment, a specific category of fraud, differently from common fraud or other categories of fraud. As such, the question still exists in Washington as to whether the independent duty doctrine bars all fraud claims except fraudulent concealment, or if fraud, in general, can be an exception. As the Court of Appeals for Division 3 aptly noted, "many other jurisdictions have found that the economic loss rule does not bar fraud." *Baddeley v. Seek*, 138 Wash.App. 333, 338, 156 P.3d 959, 961 (2007). The amici here argue that this is the correct position for this Court to adopt.

2. <u>There is an Independent Duty Not to Commit Fraudulent Concealment in the Contracting Process.</u>

This Court has recognized the general rule by referencing an exemption for fraudulent concealment claims from the independent duty doctrine in *Alejandre*. *Alejandre*, *supra*, at 871. Indeed, there are four circumstances generally recognized where an action for fraud may arise from nondisclosure or concealment:

(1) When the defendant is in a fiduciary relationship with the plaintiff;
(2) When the defendant had exclusive knowledge of material facts not known to the plaintiff;
(3) When the defendant actively conceals a material fact from the plaintiff; and

(4) When the defendant makes partial representations but also suppresses some material facts.

37 Am. Jur. 2d, *Fraud and Deceit* § 200. Additionally, while the duty to disclose necessary for claims for fraudulent concealment will only arise as a result of some sort of transaction between the parties, an express agreement is not necessary for recovery. *Id.*

In the present case, Elcon and EWU were involved in a transaction, i.e. the public bidding process; however, the parties had not yet formed a contract when the fraud alleged by Elcon occurred. EWU had exclusive knowledge of material facts contained in the Golder Report not known to Elcon, and EWU made a partial representation by disclosing other hydrogeological information, but actively concealed the Golder Report from Elcon and actively misrepresented its existence. Elcon had a right to believe EWU's statements were true, and rely on those statements in preparation of tis bid proposal. "A man who deals with another in a business transaction has a right to rely upon representations of facts as the truth." *Scroggin v. Worthy*, 51 Wn.2d 119, 123-24, 316 P.2d 480, 482-83 (1957). The bidding process is not itself a contract, but it *is* a business transaction, and Elcon had a right to rely on EWU's statements. Under *Alejandre*, and the general rule relating to fraudulent concealment, Elcon has an action for fraud against EWU.

Additionally, the general rule relating to failure to disclose the details of required work or soil conditions may be assistive to this Court relative to its ruling in this case:

> Fraud justifying rescission or damages may be based in a proper case on misrepresentations to a contractor with respect to subsurface conditions or the amount or character of the work required under a contract. . . . an owner's failure to disclose material items, if fraudulent or in reckless disregard of the need of disclosure may be ground for rescission or an action for fraud.

37 Am. Jur. 2d, *Fraud and Deceit* § 216. Here, EWU misrepresented both the subsurface conditions and the amount of work required by actively concealing the Golder Report from bidders and by designing the project to include a well-drilling depth of only 750', despite superior knowledge that such depth would not be sufficient to reach an adequate supply of water.

EWU's actions were both fraudulent and in reckless disregard of the need of disclosure. Further, EWU's fraud occurred outside of and prior to the contract. As such, Elcon has an action for fraudulent concealment.

3. <u>There is an Independent Duty Not to Commit Fraud in the Inducement in the Contracting Process.</u>

The District Court for the Eastern District of Washington, applying this Court's recent decisions, has recently ruled that there is an "independent duty to not commit fraud" and accordingly, "[p]laintiffs are permitted to sue for . . . fraud in the inducement in addition to a breach of contract claim." *Strategic Intent LLC v. Strangford Lough Brewing Co. Ltd.*, _ F.3d _, 2011 WL 3810474 (ED.Wa. May 11, 2011). The amici urge the same result here.

With regard to fraud in the inducement, this type of fraud, by nature, occurs prior to the formation of any contract. Supplemental authority, while not binding, may again be helpful:

> Fraud in the inducement presents a special situation where the parties to a contract appear to negotiate freely, which normally would constitute grounds for invoking the economic loss doctrine, but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior; the interest protected is a plaintiff's right to justifiably rely on the truth of a defendant's factual representation in a situation where an intentional lie would result in loss to the plaintiff. Thus, claims for the tort of fraudulent inducement are not barred by the economic loss doctrine. [internal citations omitted]

37 Am. Jur. 2d, *Fraud and Deceit* § 279. Likewise, as noted above, Washington courts have long since recognized the right to justifiably rely on the truth of another's representations in business transactions. *Scroggin v. Worthy*, 51 Wn.2d 119, 123-24, 316 P.2d 480, 482-83 (1957). Allowing claims for fraud in the inducement to survive the independent duty doctrine protects this recognized right.

In this case, Elcon had a right to rely on EWU's representations that no other hydrogeological information existed. It further had a right to rely on the accuracy of the plans and specifications included in EWU's Request for Proposal under the *Spearin* doctrine. "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Spearin v. United States*, 248 U.S. 132, 136, 39 S.Ct. 59, 61 (1918). Further, "[t]his responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work." *Id.*

Elcon was required by Specification 1.03 to perform a site investigation, which it performed. Elcon found no readily ascertainable basis to doubt EWU's planned specified depth of 750'. Elcon requested data relating to exploratory work by the owner, and was supplied some data and advised by EWU that no other data existed. Elcon was thereby satisfied by EWU's fraud, and induced to bid.

Particularly relevant here, because this was a public works project, Elcon had no opportunity to modify its scope of work or negotiate the risk associated with EWU's representations. It was forced to take them at face value, perform subsurface investigations beyond those required by the Specifications, or refuse to bid the work.

4. Application of the Indepdent Duty Doctrine to Fraudulent Concealment and Fraud in the Inducement Claims Runs Counter To Public Policy.

Fraudulent concealment and fraud in the inducement claims arose due to a shift away from the doctrine of *caveat emptor*, i.e. 'buyer beware':

> In the olden days, under the doctrine of *caveat emptor*, courts were inclined to think that a man dealt with another at his peril and that he should be on the lookout for possible deception, failing which, he would be penalized as negligent in failing to discover the fraud that was being perpetrated on him. The modern rule is against such an attitude. A man who deals with another in a business transaction has a right to rely upon representations of facts as the truth. [internal citations omitted]

Scroggin v. Worthy, 51 Wn.2d 119, 123-24, 316 P.2d 480, 482-83 (1957). To now rule that the independent duty doctrine bars fraud claims, and particularly claims for fraud in the inducement, would essentially plummet Washington contract law back in time to those "olden days" where the doctrine of *caveat emptor* dominated the court's view of the business world.

Specifically with regard to this case, such a ruling would reward EWU for its fraudulent concealment and misrepresentation of material facts from the contractors who bid the project at issue, and would penalize

Elcon for not going above and beyond the requirements of the project specifications to discover EWU's fraud prior to bidding the project.

Washington courts, as early as 1909, rejected the *caveat emptor* doctrine and held that "there is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars . . . and refuses them redress whenever they fail to act upon that assumption." *Woddy v. Benton Water Co.*, 54 Wash. 124, 127, 102 P. 1054, 1056 (1909). The application of independent duty doctrine to fraudulent concealment and fraud in the inducement claims such as Elcon's claims would become just such a rule of law, and as such, is against public policy.

5. <u>Application of the Independent Duty Doctrine to Fraud Claims In Public Contracting Runs Counter To Public Policy.</u>

As noted above, one of the basic cornerstones supporting the application of the independent duty doctrine is that the parties have the opportunity to allocate risk and liability during the contracting process. While risk allocation may often occur in a private contracting setting, bidders on public works projects are required to submit a binding bid based on the terms established by the publishing governmental entity. *See* RCW 39.04, *et seq.*

It has been held in other jurisdictions that the economic loss rule does not apply in situations where the parties have never been in a position to negotiate risk, and such cases should be persuasive to this Court. *See e.g., Neibarger v. Universal Coops. Inc.*, 439 Mich. 512, 525, 486 N.W.2d 612 (1992). Applying the economic loss rule to claims of fraudulent concealment and fraud in the inducement, and specifically on such claims in the setting of public works, is counter-intuitive because public works contractors have no opportunity to negotiate liability or allocate the risk of a public entity's fraud. The choice is simply bid or not bid, and recognizing the current tumultuous economy, the option not to bid may not truly be an option at all.

Further, it is a well-accepted principle that the purpose of requiring public bidding on public contracts is "to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable." *Gostovich v. City of W. Richland*, 75 Wn.2d 583, 587, 452 P.2d 737, 740 (1969), *citing Edwards v. City of Renton*, 67 Wash.2d 598, 602, 409 P.2d 153, 157 (1965) and 10 McQuillin, Municipal Corporations, § 29.29 (3d ed. 1966 revision).

Allowing the application of the independent duty doctrine to shield public entities from liability when they themselves have committed fraud in the public bidding process would essentially defeat the primary purpose of public bidding. As a result of such an application, the opportunity for and likelihood of fraud and improvidence would increase, and a contractor's inability to adequately protect itself from a public entity's fraud will lead to increased costs for public works due to the inclusion of contingency amounts within bids. These contingencies will be associated with the contractor's perceived risk of government fraud, and will not be controllable by public entities. Additionally, due to increased volatility in the industry, and the resultant possibility for increases in contractor bankruptcies, there may be fewer contractors in business to bid on public works projects.

The concept of allowing public entities to commit fraud in the public works bidding process flies in the face of the intrinsic value that makes the public bidding process so essential. To allow such a finding would undermine the longstanding public policy. As such, this Court should choose not to apply the independent duty doctrine to claims for fraudulent concealment and fraud in the inducement particularly within the public works sector.

V. CONCLUSION.

As noted above, this Court has held that the application of the independent duty doctrine "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Eastwood*, 170 Wn.2d at 389, *citing Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). Logic and common sense tell us that we should not shield anyone, including a governmental entity, from liability for fraudulent actions, and that such a decision would run counter to the principles of justice. A decision applying the independent duty doctrine to fraudulent concealment or fraud in the inducement would also violate important tenants of public policy in Washington. This Court has previously noted that the independent duty doctrine does not automatically bar claims for fraudulent concealment, and the amici request that this Court rule that claims for fraud, and specifically fraud in the inducement, are likewise not automatically barred by the independent duty doctrine merely because a contract exists between parties.

DATED this 27th day of September, 2011.

Robert H Crick

ROBERT H. CRICK, JR.
WSBA No. 26306

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury of the laws of the State of Washington that on the 27th day of September, 2011, I caused a true and correct copy of the foregoing to be served in the manner indicated below:

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By [signature]
Tiffany R. Spencer, Paralegal